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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-324

RUSSELL L. CARTER,

Petitioner,

vs.

UNITED STATES.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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I. GROUNDS FOR A REHEARING

This matter should be reconsidered by this Court, because of intervening circumstances of substantial and controlling effect and to substantial grounds available to the Petitioner although not previously presented. The intervening circumstances arise from the publication in the October 18, 1972 issue of the Criminal Law Reporter (12 Cr.L. 4036, et. seq.) of the arguments before this Court in *Schneckloth* v. *Bustamote,* 448 F.2d 699 (CA 9, 1971). Counsel for the petitioner did not see this case nor know of its existence prior to reading the Criminal Law Reporter

at the end of the month of October. The petition in this case for the writ of certiorari was filed with this Court in August, 1972 almost two months before *Schneckloth*, the grant of certiorari therein and its argument came to the attention of counsel for the petitioner. *Schneckloth* has an issue in it which is identical or similar to an issue raised in the subject case, that is, knowing waiver of Fourth Amendment rights.

In *Schneckloth*, the first question on which certiorari was granted is as follows (10 Cr.L. 4193):

> "Must a verbal expression of consent in response to a polite police request to search an automobile to be substantiated by a demonstration that the consent was given with knowledge that it could be withheld?"

The Criminal Law Reporter's description of the oral argument in *Schneckloth* shows that the question of whether Miranda-like warnings for Fourth Amendment rights are necessary was discussed. The statement of issues in the brief submitted to the Sixth Circuit by the petitioner Carter herein stated the following:

> "2. Did the trial court commit error in failing to to suppress evidence which was obtained from the defendant without his being given advance warning of his Fourth Amendment rights?" (see page V of Brief of Appellant filed in the Sixth Circuit).

Prior to discovering this Court's interest in *Schneckloth*, counsel for petitioner thought this issue was dead. The decision of the Ninth Circuit in *Schneckloth* and the decision of the Sixth Circuit in this case are in conflict. The grant of certiorari in *Schneckloth* and the treatment accorded it before the Supreme Court, of which counsel for petitioner had no knowledge prior to October, 1972, requires this court to allow in this case.

II. ARGUMENT

During the course of the investigation and interviews of Carter there were no warnings of any Fourth Amendment rights accorded Carter by the I.R.S. agents. A Motion to Suppress all evidence and statements obtained from Carter was filed, based upon this failure. The trial court denied the Motion to Suppress. This was error.

A. The protection of the Fourth Amendment against wrongful searches and seizures applies to investigations by I.R.S. agents, whether performed by revenue agents or special agents.

Arguably, everything that was done by the Internal Revenue Service in Carter's case from a point during the first interview on July 27, 1966 was part of an investigation to establish his guilt. The memorandum of interview for July 27, 1966 by Revenue Agent Richards states in the first paragraph (Exhibit D):

> "Based on what taxpayer reported on his 1963, 1964 and 1965 Tax Returns, plus what income was reflected per the Ledger Book, it appeared that the taxpayer may have understated his income."

This occurred in the memorandum at the very inception of the first day's examination. Thus, there was a focusing "on a particular suspect," under the concepts of *Escobedo* v. *Ill.*, 37 U. S. 478 (1964). This meant the case had moved from a civil liability examination to a criminal proceeding. Certainly, it moved into a criminal proceeding when the special agent became involved in the investigation on September 22, 1966. As a result, the Fourth Amendment protection would apply. Of course, the Fourth Amendment applied to Carter from the minute that Revenue Agent Richards walked into Carter's office. The Fourth

Amendment applies to "administrative searches" as well. This was established in *Camara* v. *Mun. Ct.*, 387 U. S. 523, and *See* v. *Seattle*, 387 U. S. 541, which applied the search and seizure concepts to investigations by administrative agencies, even though they were not involved in criminal investigations.

B. The protection of the Fourth Amendment applies not only to the records but statements and oral information elicited from the accused as well.

The Fourth Amendment is not confined to physical objects and papers. It also applies to statements elicited from an individual. In *Wong Sun* v. *U. S.*, 371 U. S. 471, (1963), statements obtained from an individual while he was wrongfully arrested were suppressed. Statements which had been obtained as a result of wrongful eavesdropping, electronic or otherwise, will be suppressed, *Silverman* v. *U. S.*, 365 U. S. 505, (1961).

C. Before an Internal Revenue Service agent can examine records of a private citizen and obtain statements from him, which are then subsequently to be used by the United States in a criminal proceeding, the private citizen must be advised of his rights under the Fourth Amendment and then after such advice an intelligent waiver thereof must be obtained by the agent.

When significant constitutional rights are involved, the law requires that there be an intelligent waiver thereof. Intelligent waiver means that the individual must be warned and advised what his rights are, and then he must manifest in some overt manner a waiver of these rights. The law does not require the individual to assert those rights, without first being advised of those rights. In *Carnley* v. *Cochran*, 369 U. S. 506, 516, the Supreme Court dealt

with the requisites of a waiver of the right to counsel. The record was silent. Said the court:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandably rejected the offer. *Anything less is not waiver.*" (Emphasis added)

Thus, mere silence by the accused and a failure on his part to assert his right to an attorney is insufficient for waiving of a right to counsel. On a plea of guilty, an accused may not plead "without an affirmative showing that (his plea) was intelligent and voluntary. *Boykin* v. *Ala.*, 395 U. S. 238, (1969). There the Supreme Court quoted the above language from *Carnley* v. *Cochran, supra,* and stated that "the same standard must be applied to determining whether a guilty plea is voluntarily made." Again, the individual must be advised of his rights, before he can intelligently waive those rights in a guilty plea.

The 1966 amendment to Rule 11 of the Federal Rules of Criminal Procedure required that the judge should not accept a plea without "first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." The Supreme Court held that failure of the trial judge to comply with that requisite means the plea is invalid, *McCarthy* v. *U. S.*, 394 U.S. 459, (1969). In explaining why strict adherence to that rule of personal interrogation by the trial judge must be enforced, Chief Justice Warren stated the purpose of this rule:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his

> right to a trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."

Thus the federal courts have long recognized that in order for there to be a waiver of significant constitutional rights, it is necessary that the waiver must be "an *intentional* relinquishment or abandonment of a *known* right . . ."

In order to assure that the individual intentionally relinquishes a known right, he must be warned of these rights. When a court record is silent on warning, then relinquishment or waiver does not stand. The requirement that there can only be a waiver of an individual's rights after he has been warned is not confined to the court room. When these constitutional rights apply outside of the court room, the law also requires that there must be a warning, before there can be an intelligent relinquishment. The classic illustration of this is *Miranda* v. *U. S.*, 384 U.S. 436, (1966). There, the Court held that the privilege against self-incrimination applied to interrogation outside of a court room. As an ancillary right, to effectuate the privilege against self-incrimination, the Supreme Court also held that the right to counsel would also apply during the course of interrogations. The Court then held that in order for there to be a valid interrogation, the accused must be warned at the very inception of the interrogation of both rights and then there must be some overt manifestation of a waiver. In the absence of these warnings, the statements are inadmissible. As regards the waiver of right to counsel in the field, the Supreme Court stated in *Miranda* (384 U.S. at ——):

"No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. * * * In *Carnley* v. *Cochran*, 396 U.S. 506, 513, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), we stated: '(I)t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.
Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. *No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.*" (Emphasis added)

Thus the Court applied the same requisites for a valid waiver of right to counsel in the field as in a court room, *i.e.*, a statement to the accused of what the rights are, he need not expressly request the right, and then he must waive on an intelligent basis. This is so because the Supreme Court expressly cited *Carnley* v. *Cochran* in the above quote.

There is a division of authority as to whether *Miranda* is applicable, on the privilege against self-incrimination,

during I.R.S. interrogations in the field. Some courts have held, as to the privilege against self-incrimination, that there must be the *Miranda* warnings in the field just as well, at least when the special agent appears. See *U. S.* v. *Dickerson,* 413 F.2d 1111 (CA 7 1969); *U. S.* v. *Turzynski,* 268 F. Supp. 847 (N.D. Ill., 1967); *Goodman* v. *U. S.,* 285 F. Supp. 245 (Cal., 1968); *U. S.* v. *Wainwright,* 284 F. Supp. 129, (Colo. 1968). On the other hand, there is ample authority which indicates that the *Miranda* requisites for privilege against self-incrimination purposes, do not apply. But that split of authority does not apply to our argument. The cases which have held *Miranda* not applicable has so ruled on the basis that they can find no *custodial* interrogations involved. This is logical in that the privilege against self-incrimination requires some form of compulsion before it can be invoked ("nor shall be *compelled* in any criminal case to be a witness against himself . . .") The Fourth Amendment does not require any element of compulsion to be involved. The Fourth Amendment is a curtain which surrounds an individual, his home, his office and his records constantly. All that is necessary for the Fourth Amendment to be involved is for the government to intrude upon the man's privacy. Compulsion is irrelevant. In *U. S.* v. *Katz,* 389 U.S. 347, a tap on a public pay phone, which allowed the government to eavesdrop on conversation, was held an invasion of Fourth Amendment rights. There was no aspect of compulsion at all involved.

But *Miranda* is of assistance in determining the requisites for an individual's waiver of constitutional rights outside of a court room. When those rights apply, *Miranda* and all of the above authority establish that those rights cannot be waived without a warning. Warning is necessary to assure an intelligent relinquishment or abandonment of rights. If that is true of the privilege against self-in-

crimination and the right to counsel, it must necessarily apply to the protections accorded by the Fourth Amendment. The right to counsel and the privilege against self-incrimination may be as important as Fourth Amendment rights, but they are certainly no more important. If anything, the Fourth Amendment rights probably have a higher value in our constitutional hierarchy than the privilege against self-incrimination and right to counsel. The history of the Supreme Court has been gradually to include the provisions of the Bill of Rights in the Fourteenth Amendment's Due Process Clause. In determining which one of the Bill of Rights limits state government, the Court included only those rights which are fundamental to our concepts of ordered liberty. The Fourth Amendment was given recognition long before the privilege against self-incrimination. Thus in *Wolf* v. *Colo.*, 338 U.S. 25 (1949), the Supreme Court recognized the Fourth Amendment as being a limitation upon state government, although it did not apply the exclusionary rule at that time. Finally in *Mapp* v. *Ohio,* 367 U.S. 643, (1961), the federal exclusionary rule was also applied to the states. Thus by 1961, the Fourth Amendment was applied in an undiluted manner as a limitation against state action. The right to counsel was not held applicable in an undiluted manner to state court proceedings until 1963 in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). The privilege against self-incrimination was not included as being protected against state action until 1964 in *Malloy* v. *Hogan,* 378 U.S. 1. Thus the prior recognition of the Fourth Amendment as fundamental to the "concepts of ordered liberty" means that it is no less important than the later recognized privilege against self-incrimination and right to counsel. If the latter two cannot be waived in the absence of a warning, it necessarily follows that the Fourth Amendment cannot be waived in the absence of warnings either.

There is ample authority supporting our argument that the *Miranda* requisites of express warnings before there can be a valid waiver apply to Fourth Amendment rights.

In *U. S.* v. *Blalock,* 255 F.Supp. 268 (D.C. Pa. 1966), the defendant was met by FBI Agents and then frisked. They then went to his room, and the party entered. After some questioning of defendant, he was asked if he minded if the FBI men searched his room. He stated there was no objection. Incriminating evidence was found. On a motion to suppress, Judge Lord granted the motion to suppress. He found that there must be an "intentional relinquishment or abandonment of a known right" before there is an effective waiver, citing *Johnson* v. *Zerbst,* 304 U.S. 458, *supra.* He then wrote (255 F.Supp. 269-70):

> "First, the consent must have been 'intelligent.' Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.' *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States ex rel. Mancini* v. *Rundle,* 337 F.2d 268 (CA 3, 1964). Certainly, one cannot intelligently surrender that which he does not know he has. Cf. *United States ex rel. Mancini* v. *Rundle,* supra; *Walker* v. *Pepersack,* 316 F.2d 119 (CA 4, 1963). The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd. Conceivably, the assent of the defendant may have been 'the false bravado of the small-time criminal.' *Judd, supra.* 190 F.2d at 651; or it may have been an untutored submission to authority.

> Which it was could have been resolved by the officers at the scene. To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation. Here, the evidence shows no such warning, nor is there any other evidence that Blalock was aware of his Fourth Amendment right. It cannot be said, then, that the Government has sustained its burden of showing that there was an intelligent waiver of a known right."

In *U. S.* v. *Nikrasch,* 367 F.2d 740 (CA 7 1966), after the defendant was arrested, he "permitted" the law enforcement men to examine his car. Defendant filed a motion to suppress the evidence obtained as a result of the search of the vehicle. The Seventh Circuit found there could be no consent to search (367 F.2d at 744):

> "Since the arrested defendant was then in custody in the Skokie cell-block and had not been apprised of his Fourth Amendment rights, the trial court correctly observed that no true consent had been given to Detective Reiter. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461; *Judd* v. *United States,* 89 U.S. App.D.C. 64, 190 F.2d 649, 651 (1951); *United States* v. *Blalock,* 255 F.Supp. 268 (E.D.Pa., 1966)."

In *U. S.* v. *Moderacki,* 280 F.Supp. 683 (D.C. Del. 1968), the defendant, as postal employee, was taken to a postal inspector's office and given *Miranda* warnings. He expressly waived. He was then asked if he would mind emptying his pockets, which he proceeded to do. He was given no warning as regards the effect of what could be obtained from his pockets. On a motion to suppress the evidence that was obtained from his pockets, the District Court held that in the absence of a warning that he need not submit

to a search, and that anything found could be used against him, there could be no knowing waiver by the defendant. Said the district court, 280 F.Supp. at 636:

> "The key to a voluntary waiver is whether it was done knowingly. An inference that a person has been warned is not one and the same thing as an actual warning. The rule of waiver is not intended so much for the protection of the cool, hardened, criminal as for the slow-witted offender and perhaps on occasion, the innocent person caught in a web of circumstances who becomes frightened or confused. The former, but not necessarily the latter, might suspect that the Miranda-type warning is equally applicable to a search. It is obviously repetitive, and may even seem slightly ridiculous, for an officer, having once given the Miranda warning before taking a suspect's statement, to have to repeat relatively the same warning before searching his person. But only in this fashion can it be known beyond doubt that the suspect, in emptying his pockets, has done so with a full knowledge of what he is doing. Lacking an explicit warning as to his rights under the Fourth Amendment, it can never be known with certainly whether a defendant voluntarily waived those rights. Accordingly, the search was unlawful insofar as it rests upon the defendant's waiver of his rights." Also see *Perkins* v. *Henderson,* 418 F.2d 441 (CA 5 1969).

Two cases have supplemented the Fourth Amendment right with the right to counsel, as *Miranda* did with the privilege against self-incrimination.

In *U. S.* v. *Fisher,* 9 Cr.L. 2405 (U.S.D.C. Minn. 7/22/71), the defendant was arrested. He was given his Miranda warnings and then was arraigned before a United States Commissioner. Later, he signed a consent to search form. The district court granted a motion to suppress and held that the form was inadequate. Said the District Court (9 Cr.L. 2406):

"The argument of course is present that Miranda was a Fifth Amendment case and did not countenance a Fourth Amendment search and seizure claim. This court believes a defendant's Fourth Amendment rights are encompassed by Miranda. No one here orally advised defendant, so far as the testimony discloses, of his right not to consent to a search, though Exhibit 3 contains language to this effect, nor the consequences thereof. Certainly this is a vital or critical step in his case, and having asked for counsel he was entitled to advice of counsel as to the consequences of what he was doing and as to what would be required to obtain a search warrant. The only direct authority that has come to the court's attention — and with which this court agrees — is *United States* v. *Pelensky*, 300 F.Supp. 976 (D.Vt. 1966). * * * *Pelensky* was a case where no Miranda warnings were in fact given. The result this court reaches would follow as an a fortiori where warnings were given yet defendant refused to talk and requested counsel.

Noteworthy also is the fact that in the case at bar there was no immediacy to the situation. Defendant was incarcerated and had not yet made bail; the Commissioner, who can authorize a search warrant, was present and yet no application was made therefor. This was not a search incident to arrest nor under any exigency. If in fact the Secret Service Agents had probable cause to believe that the items they ultimately found were in defendant's house, there would have been no problem in securing a search warrant and proceeding accordingly.

Accordingly the court grants defendant's motion to suppress the items seized at defendant's residence and any 'fruits' thereof and of course any oral testimony concerning the same."

In *U. S.* v. *Pelensky*, 300 F.Supp 976 (D.C. Ver. 1969), the defendant was an occupant of a vehicle which was ordered to the side of the road. He was asked for the

gun in his possession, which he turned over to the law enforcement men. The district court suppressed the evidence, but on the basis that the defendant should have been told of his right to counsel. Said the district court (300 F.Supp. at 978-9):

> "The right to counsel, and the *Miranda* warning informing the accused of his right, while imposed to protect fifth amendment rights in *Miranda*, is more pervasive. It is not linked solely to the protection of fifth amendment rights but applies in every 'critical' stage of the proceedings. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Certainly a request to produce evidence that is central to the prosecution's case is a critical stage of the proceedings against the accused. The presence of counsel is an effective check on the unknowing relinquishment of fourth amendment rights just as it is an effective check on the unknowing waiver of fifth amendment rights. Therefore, production of evidence by an accused without the assistance of counsel or without waiver of counsel where, as in *Miranda*, the defendant is under arrest, cannot be considered a knowing and intelligent act.
>
> Accordingly, because of the failure of the arresting officers in this case to inform the defendant of his right to counsel prior to requesting the revolver and the absence of any mitigating circumstances, the motion to suppress must be granted."

Admittedly, these cases involved situations where the accused was incarcerated and the custodial requisites of *Miranda* were met. But as we have shown above, there is no prerequisite of compulsion for Fourth Amendment rights to be involved. The Fifth Amendment requires compulsion, which inheres in custody situations. Because the Fourth does not require compulsion, there need be no custody for it to be applicable.

In addition, traditionally the courts have recognized that one can have a "consent search." The trouble with that line of authority is that those cases have not considered the implications of the authority requiring a warning of rights before there can be an intelligent waiver. The clear implication of the cases cited above, dealing with right to counsel, privilege against self-incrimination, right of confrontation, right to a jury trial, and search and seizure, is that there can be no waiver in the absence of a warning.

D. As applied to our case.

As we argued to the trial court in our Motion to Suppress, there was no warning given at any time to Carter by I.R.S. on his Fourth Amendment rights. No statements were made by them in relation to his right to require a search warrant, or at the least a summons. The fact that he did not assert his Fourth Amendment rights is irrelevant under the above line of authority. The obligation is on the government to warn him of those rights and to obtain from him an express waiver after such warning. Because these warnings were not accorded Carter, the trial court should have suppressed all of the records and statements obtained from Carter. Reversible error was committed.

III. CONCLUSION

The Sixth Circuit in this case rendered a decision which is in conflict with that of *Schneckloth* in the Ninth Circuit. This represents an important question of federal law which should be settled by this court. The Sixth Circuit decided this case in a way which is in conflict with the applicable decisions of this Court. Because of the grant of *certiorari* in *Schneckloth*, along with its oral argument of Miranda-

like warnings on Fourth Amendment rights, *Schneckloth* is identical to our case. Based on all of the above, this Court should grant this petition for a rehearing and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

This Petition for Rehearing is presented in good faith and not for delay, and is exclusively attributable to the grant of *certiorari* in *Schneckloth*, its argument before this Honorable Court on October 10, 1972, with a synopsis of that argument being printed in the Criminal Law Reporter of October 18, 1972. Counsel for petitioner had no knowledge of the above until late October, 1972. The Petition is restricted to the grounds specified in this Petition for a Rehearing.

.....

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